

# Washington Journal of Law, Technology & Arts

---

Volume 8 | Issue 2

Article 3

---

10-1-2012

## Social Media Policies for Character and Fitness Evaluations

Jessica Belle

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjlta>



Part of the [Legal Profession Commons](#)

---

### Recommended Citation

Jessica Belle, *Social Media Policies for Character and Fitness Evaluations*, 8 WASH. J. L. TECH. & ARTS 107 (2012).  
Available at: <https://digitalcommons.law.uw.edu/wjlta/vol8/iss2/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Law, Technology & Arts by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS  
VOLUME 8, ISSUE FALL 2012

SOCIAL MEDIA POLICIES FOR CHARACTER  
AND FITNESS EVALUATIONS

*Jessica Belle*\*

© Jessica Belle

Cite as: 8 WASH J.L. TECH. & ARTS 107 (2012)  
<http://digital.law.washington.edu/dspace-law/handle/1773.1/1170>

ABSTRACT

*In 2009, Florida became the first U.S. jurisdiction to articulate a Character and Fitness Evaluation (CFE) policy of examining the social media accounts of bar applicants who had demonstrated a history of questionable conduct such as substance abuse or seeking to violently overthrow the U.S. government. This policy may allow access to otherwise legally inaccessible data, which creates a risk of the bar unlawfully considering information protected by applicants' constitutional rights. Over the past 60 years, the U.S. Supreme Court has split on whether bar organizations may constitutionally deny bar admission to applicants who refuse to answer certain questions on this basis. This Article proposes that bars should publish (1) the types of traits an applicant must demonstrate to succeed on a CFE; (2) the types of conduct that may warrant further inquiry and eventually lead to an unsuccessful CFE; (3) criteria for evaluating suspect conduct; and (4) the types of information gathered on applicants' social media accounts that may not be considered by the bar.*

---

\* Jessica Belle, University of Washington School of Law, Class of 2013. Thank you to Luke Rona, Professor Thomas Andrews and Professor Robert Aronson for all their generous help in drafting this Article.

## TABLE OF CONTENTS

Introduction.....	108
I. Background.....	109
A. Predicting Law Students' Use of Social Media Based on Existing Studies of Medical Students' Use of Social Media .....	110
B. Character and Fitness Evaluations .....	111
II. Florida's Social Media Policy .....	112
A. Florida's Character and Fitness Evaluation .....	113
B. Florida's Social Media Policy.....	113
C. Other States' Social Media Policies.....	114
III. Supreme Court Jurisprudence of Character and Fitness Evaluations .....	114
A. Black Letter Law .....	115
B. Applying Past Jurisprudence to Social Media .....	116
IV. Current Proposals and a New Proposal for Bar Policies on Social Media in CFEs .....	118
A. Current Scholarship .....	118
B. A Proposal for Clarity in CFE Standards and Constitutional Social Media Policies .....	120
V. Conclusion .....	121
Practice Pointers.....	122

## INTRODUCTION

The increasing use of social media such as Facebook and Twitter by the legal community poses ethical questions for the state bar associations that monitor lawyer conduct. Members of the legal community have written extensively on the expectations for professional use of social media by attorneys and warned that violation of rules of professional conduct through online behavior will result in disciplinary actions.<sup>1</sup> However, bar associations have

---

<sup>1</sup> See, e.g., Diana Dearmin, *Lawyers Tweeting, Blogging, and IMing — Oh My! Potential Ethical Pitfalls Under the RPCs*, WASH. STATE BAR NEWS (Seattle, WA), April 2010, at 29-31; see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (discussing how rules of professional conduct regarding advertising and creation of attorney-client relationship

generally not articulated how the online conduct of candidates seeking admission to the bar will impact admission decisions.

In 2009, Florida became the first jurisdiction to announce a policy of requesting access to a bar applicant's social media accounts when a candidate demonstrated questionable moral conduct. Commentators have split on the amount and types of information that a bar association should and may constitutionally consider from an applicant's social media accounts.

This Article proposes applicants' constitutional rights will be best protected by published character and fitness evaluation (CFE) policies regarding social media that specify what information bar examiners may not consider. Section I will provide a brief background on the current use of social media as well as the nature of CFEs. Section II will explore the Florida State Bar Association's character and fitness evaluation as well as the State's social media policy. Section III will discuss U.S. Supreme Court jurisprudence on CFEs and how it could be applied to CFE social media policies. Finally, Section IV will critique current arguments regarding CFE social media policies and propose a new standard.

## I. BACKGROUND

The Internet has become a way of life and people increasingly use social media to connect with friends, network, and create a professional identity. As many as 75 percent of American adults between the ages of 18 and 24 have profiles on social media sites, while 57 percent of those between 25 and 34 use social networking sites.<sup>2</sup>

Attorneys are increasingly establishing a presence for themselves online: firms have websites and social media accounts; online organizations rank and evaluate attorneys; and individual

---

through websites); *see also* N.M. Bar, Advisory Op. 2001-1 (2001) (applying New Mexico Rules of Professional Conduct to attorneys' use of listserve-type message boards).

<sup>2</sup> Memorandum from Amanda Lenhart on adults and social network websites (Jan. 14, 2009) (on file with Pew Internet & American Life Project Website at [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Adult\\_social\\_networking\\_data\\_memo\\_FINAL.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Adult_social_networking_data_memo_FINAL.pdf)).

attorneys use social media activity for both personal and professional purposes.<sup>3</sup> Like attorneys, law students also engage with social media.

*A. Predicting Law Students' Use of Social Media Based on Existing Studies of Medical Students' Use of Social Media*

Although numerous articles and disciplinary cases discuss the types of unprofessional conduct exhibited by attorneys through social media, there are no studies demonstrating the types of unprofessional online conduct exhibited by law students. However, various studies have examined the types of unprofessional conduct exhibited by medical students on their social media accounts.<sup>4</sup> Medical students, like law students, are expected to adhere to their profession's ethical code even as students. With respect to social behavior, there is not reason to expect law students to behave differently than medical students. Therefore, bar associations will likely discover similar types of unprofessional conduct as those currently found on medical students' social media accounts.

A 2009 study of the use of social media by medical students indicated that 60 percent of medical schools studied had incidents of unprofessional online conduct.<sup>5</sup> The study revealed that: 13 percent of schools reported violations of patient confidentiality, 52 percent of schools reported use of profanity, 48 percent reported discriminatory language, 39 percent reported depictions of intoxication, and 38 percent had incidents of sexually suggestive material.<sup>6</sup> In response to such behaviors, 30 of 45 schools reporting

---

<sup>3</sup> Kathleen Elliott Vison, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355 (2010).

<sup>4</sup> See, e.g., H.M. Swick, P. Szenas, D. Danoff, & M.E. Whitcomb, *Teaching Professionalism in Undergraduate Medical Education*, 282 J. AM. MED. ASS'N. 830 (1999); A. Kao, M. Lim, J. Spevick, & B. Barzansky, *Teaching and Evaluating Students' Professionalism in US Medical Schools, 2002-2003*, 290 J. AM. MED. ASS'N. 1151 (2003); Katherine C. Chretien, S. Ryan Greysen, Jean-Paul Chretien, & Terry Kind, *Online Posting of Unprofessional Content by Medical Students*, 302 J. AM. MED. ASS'N. 1309 (2009).

<sup>5</sup> Chretien et. al., *supra* note 4, at 1311.

<sup>6</sup> *Id.*

incidents gave informal warnings, while three dismissed students for their online behavior.<sup>7</sup> Other studies reached similar conclusions.<sup>8</sup> Though law students' online behavior will not exactly resemble that of medical students, these studies suggest the types of unprofessional conduct that law students may engage in through their social media accounts. It seems strange that bar organizations do not even have a policy as to whether bar applicants' online behavior will be evaluated pending admission to the bar, because (1) bar organizations expect attorneys' online behavior to adhere to the professional rules of conduct, and (2) data based on medical students suggest law students likely exhibit some unprofessional conduct online.

### *B. Character and Fitness Evaluations*

Each potential lawyer must undergo a CFE as part of a jurisdiction's bar admission process to become a licensed attorney.<sup>9</sup> The CFE component exists to protect the public and the system of justice from unethical individuals.<sup>10</sup> Although the Comprehensive Guide to Bar Admission Requirements 2011 recommends that each bar publish its character and fitness standards, 18 of 56 jurisdictions had not done so as of 2011.<sup>11</sup>

In the majority of jurisdictions, a successful candidate must demonstrate good moral character by proving that he or she is honest, trustworthy, and diligent.<sup>12</sup> Evidence of questionable conduct triggers further inquiry.<sup>13</sup> Bar candidates are afforded due

---

<sup>7</sup> *Id.*

<sup>8</sup> See Swick et. al., *supra* note 4, at 830-32; Kao et. al., *supra*, at 1151-52.

<sup>9</sup> NAT'L. CONF. OF BAR EXAMINERS & THE AMER. BAR ASS'N. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, Comprehensive Guide to Bar Admission Requirements 2011 viii (Erica Moeser & Claire Huisman eds., Nat'l. Conf. of Bar Examiners & the Amer. Bar Ass'n 2011) (noting that the CFE is administered by a body responsible to the court and independent of the bar association).

<sup>10</sup> *Id.* at vii.

<sup>11</sup> *Id.* at 16 (noting the rules should be applied consistently as well).

<sup>12</sup> *Id.* at viii.

<sup>13</sup> *Id.* (summarizing 56 jurisdictions' relevant conduct as unlawful conduct, academic misconduct, making of false statements, acts involving dishonesty,

process via notice and the opportunity to appear with an attorney before an adverse ruling is made regarding a CFE.<sup>14</sup>

Bar applicants must respond honestly to all CFE committee requests for information, and may fail the CFE if not completely candid in their responses.<sup>15</sup> Applicants may claim constitutional privileges under the First and Fourteen Amendments in response to the bar's improper requests for constitutionally protected information. However, the U.S. Supreme Court has held that a state's compelling interest to ensure attorneys—as officers of the court—have proper character and fitness may trump applicants' constitutional rights in certain cases.<sup>16</sup>

## II. FLORIDA'S SOCIAL MEDIA POLICY

The Florida bar is the first and only association to adopt a policy on how an applicant's online presence may be examined during a CFE. This policy could form the basis for other states' policies, although differences in underlying CFE requirements could require substantial tailoring of such policies.

---

fraud, deceit, or misrepresentation abuse of legal process, neglect of financial responsibilities, neglect of professional obligations, violation of an order of a court, evidence of mental or emotional instability, evidence of drug or alcohol dependency, denial of admission to the bar in another jurisdiction on character and fitness grounds, and disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction).

<sup>14</sup> *Id.*

<sup>15</sup> *See, e.g.,* Lane v. Bar Comm'n of the Neb. State Bar Ass'n, 544 N.W.2d 367 (Neb. 1996) (denying an applicant admission to the bar for not being completely candid when responding to bar application and CFE committee questions though the applicant did not intend to deceive the committee); Greene v. Committee of Bar Examiners, 4 Cal. 3d 189, 201 (1971) (denying an applicant admission to the bar because he knowingly made material misstatements on his bar application and to the CFE committee).

<sup>16</sup> *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 56 (1961) (*Konigsberg II*); *Law Students Civil Rights Research Council, Inc., et al., v. Lowell Wadmond*, 401 U.S. 154 (1971).

*A. Florida's Character and Fitness Evaluation*

Florida's published CFE standards state that a successful applicant must satisfactorily demonstrate general fitness to practice law, knowledge of the professional standards, and good moral character, including trustworthiness, honesty, and diligence.<sup>17</sup> The Florida rules state that any conduct that reflects adversely on an applicant's character may warrant further inquiry.<sup>18</sup> The bar association does not specify any types of information that it will not consider because the data is not reasonably related to the practice of law or constitutionally impermissible to consider, such as an applicant's sexual orientation or religious beliefs and practices.<sup>19</sup>

*B. Florida's Social Media Policy*

In 2009, the Florida Board of Bar Examiners adopted a policy of investigating the social networking accounts of only those applicants with certain questionable backgrounds on a case-by-case basis.<sup>20</sup> In such cases, applicants would be required to submit

---

<sup>17</sup> Rules of the Supreme Court Relating to Admission to the Bar, 2-12 *Proof of Character and Fitness* (Jan. 3, 2011), <http://www.floridabarexam.org/public/main.nsf/rules.html#1-14> (last visited Sept. 25, 2012).

<sup>18</sup> *Id.*

<sup>19</sup> Compare with Washington Admission to Practice Rule 24.2 (e) Factors Not Considered When Determining Character & Fitness, [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=APR&ruleid=gaapr24.2](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr24.2) (last visited Sept. 25, 2012) (listing factors not considered, including: racial or ethnic identity; sex; sexual orientation; religious or spiritual beliefs or affiliation; and political beliefs or affiliation).

<sup>20</sup> Florida Board of Bar Examiners re Consideration of the Final Report of the Character and Fitness Commission, 5 (2009) (available at [http://www.floridasupremecourt.org/pub\\_info/documents/2009\\_FBBE\\_Character\\_Fitness\\_Response.pdf](http://www.floridasupremecourt.org/pub_info/documents/2009_FBBE_Character_Fitness_Response.pdf)) (listing case-by-case social media inquiries may be made for applicants with concerning conduct, such as those with "a history of substance abuse/dependence, . . . significant candor concerns. . . and applicants who have positively responded to Item 27 of the bar application (regarding involvement in an organization advocating the overthrow of the government of the United States or of any state or political subdivision)").



their user name and password for all of their social media accounts.<sup>21</sup>

Because this policy is published, the Board admits that applicants “are likely to delete any derogatory material before staff has the opportunity to review it.”<sup>22</sup> There are no published opinions denying an applicant’s admission to the Florida Bar based on information discovered on social media accounts during a CFE, nor have there have been any published cases in which the Florida bar examined an applicant’s social media activity. This raises the question: did the Florida Bar Board only intend to raise awareness about the need for online discretion by future attorneys?

### *C. Other States’ Social Media Policies*

No other state has published a policy regarding use of social media in bar admissions, although several have begun informal discussions.<sup>23</sup> Other states may use Florida’s policy as a basis for their own, as Florida’s rules would be easy and practical to adopt because they are clearly stated and limited in scope.

## III. SUPREME COURT JURISPRUDENCE OF CHARACTER AND FITNESS EVALUATIONS

The U.S. Supreme Court has consistently recognized the public policy arguments in support of CFEs, while remaining concerned that the vague definition of “good moral character” may allow CFEs to “be a dangerous instrument for arbitrary and discriminatory denial of the right to practice.”<sup>24</sup> This Article limits

---

<sup>21</sup> *Id.* at 4-5.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> Interview with Jean McElroy, Director of Regulatory Services, WASH. STATE BAR ASS’N., in Seattle, Washington (October 14, 2011).

<sup>24</sup> *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (*Konigsberg I*); *see also*, Deborah Rhode, *Moral Character As A Professional Credential*, 94 Yale L.J. 491, 497-502 (1985) (noting that State bars historically have excluded women, Jews, those of Eastern European decent, religious fanatics, Communists, and adulterers, among others, because these allegedly socially unacceptable or radical political behaviors were said to have demonstrated a propensity to violate professional norms).

discussion of Supreme Court cases to those dealing with First Amendment rights of freedom of belief and freedom of association.<sup>25</sup>

### *A. Black Letter Law*

The Supreme Court has considered applicants' absolute right to freedom of belief to include their political philosophies and beliefs; thus, the Court has generally granted absolute protection from bar inquiry to applicant's political philosophies or beliefs in CFEs.<sup>26</sup> However, the Court has remained divided over a series of cases as to whether a state may constitutionally inquire into bar applicants' prior memberships in political organizations.<sup>27</sup> The Court has held that a state may constitutionally deny admission to an applicant who refuses "to provide unprivileged answers to questions having a substantial relevance to his qualifications," even if the questions relate to political beliefs otherwise protected by the First Amendment.<sup>28</sup> In these instances however, the state bar association must warn the applicant that refusal to answer may result in being denied admission.<sup>29</sup> When bar associations provide no such warning and the applicant has established proof of good moral character, denial of bar admission for failure to answer questions regarding political beliefs and prior political associations is unconstitutional.<sup>30</sup> Further, state bar organizations violate applicants' right to freedom of association by requiring applicants

---

<sup>25</sup> This Article only discusses U.S. Supreme Court cases regarding the rights of freedom of belief and freedom of association, because these rights predominately govern the types of information and extent of information that bar organizations may constitutionally obtain from an applicant's social media accounts. Discussion of other federal constitutional rights and state constitutional rights is beyond the scope of this Article.

<sup>26</sup> *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

<sup>27</sup> Whether state courts may interpret state constitutions to provide greater protection of these rights is beyond the scope of this Article.

<sup>28</sup> *Konigsberg II*, 366 U.S. at 44.

<sup>29</sup> *Id.*

<sup>30</sup> *Konigsberg I*, 353 U.S. at 724; *see also In re Stolar*, 401 U.S. 23, 30 (1971).

to list all organizations to which they have belonged since beginning law school.<sup>31</sup>

### *B. Applying Past Jurisprudence to Social Media*

Given the Court's previous five-to-four splits on cases involving the constitutionality of CFEs, the U.S. Supreme Court is likely to continue to split on cases regarding the constitutionality of CFE inquiries involving social media.

The means of obtaining information from a social media account differs significantly from the means used to obtain information at issue in previous U.S. Supreme Court cases. In those cases, information was obtained by direct examination of the bar applicant,<sup>32</sup> editorials he had written,<sup>33</sup> and affidavits given to third parties who knew the applicants.<sup>34</sup> In contrast to an interview with the bar association, there is no clear means for an applicant to refuse to provide certain information when the bar accesses the applicant's social media account(s). A third-party affidavit differs from an applicant's social media account in that the former is written by a third party in response to specific questions proposed by the bar association while the latter is written by the applicant of his or her own accord. Also, the author of an affidavit swears to the veracity of the document.<sup>35</sup> In contrast, an applicant may instead intend a statement in social media as a joke, not to be taken seriously or as true. Put simply, the difference is that when a bar association accesses an applicant's social media account it views a record of comments, messages, and pictures previously created by the applicant without understanding the context in which that record was made. Yet, the information obtained on an applicant's

---

<sup>31</sup> *In re Stolar*, 401 U.S. at 28, 33 (holding applicants may not be forced to disclose participation in groups seeking to overthrow the U.S. government by force, but the dissent argued States had a right to inquiry into an applicant's membership and willingness to participate in the forceful destruction of the government, because the State was deciding whether to "vest great professional and fiduciary power").

<sup>32</sup> *Konigsberg I*, 353 U.S. at 724-28; *Konigsberg II*, 366 U.S. at 47-50.

<sup>33</sup> *Id.*

<sup>34</sup> *Wadmond*, 401 U.S. 161-62.

<sup>35</sup> BLACK'S LAW DICTIONARY (9th ed. 2009).

social media account(s) may provide the association valuable insight into the applicant's character. Due to the differences in how information was obtained in prior Supreme Court cases compared to how it may be obtained from applicant's social media accounts, these will likely be constitutional issues for future courts to resolve.

Although there are many differences, the previous Supreme Court cases offer some guidance on how courts may rule about bar associations' use of applicants' social media accounts. The Court may hold that an inquiry into an applicant's social media account is constitutional if it is tailored to gather information reasonably related to an applicant's qualifications and moral character as an attorney.<sup>36</sup> The greatest issue that courts must resolve is whether bar associations may require an applicant to provide access to his or her social media account(s) in order to pass the CFE, or whether applicants may refuse to provide such access and still pass the CFE. If a bar association can require such access or deny admission to the bar, then a court will probably require that applicants be informed of this possibility. As in previous cases, courts may balance the type of information that the bar association seeks against an applicant's constitutional right to freedom of speech and association, which may be infringed upon by bar access to the applicant's social media account(s).<sup>37</sup> Because information in social media accounts may be stored permanently, courts will have to carefully consider how its rulings will impact others' use of social media as a form of free speech.

Further, courts must decide whether bar associations may obtain otherwise constitutionally precluded information from applicants' social media accounts. For example, it is unclear whether courts will permit bar associations to use information from an applicant's social media account(s) to obtain a history of the applicant's participation in political and religious organizations. Bar associations may attempt to create a complete list of an applicant's previous memberships in political organizations in this way because they are no longer allowed to simply ask for this

---

<sup>36</sup> See generally *Konigsberg II*, 366 U.S. 36.

<sup>37</sup> *Id.* at 51.

information.<sup>38</sup> Courts will have to determine if attempting to obtain a complete list of an applicant's memberships in political organizations is materially different than simply asking an applicant to list all such memberships.

#### IV. CURRENT PROPOSALS AND A NEW PROPOSAL FOR BAR POLICIES ON SOCIAL MEDIA IN CFES

##### A. Current Scholarship

Commentators are split on which CFE policy adheres most closely to constitutional requirements governing the use of information gathered on applicants' social media accounts in CFES. Because little has been written on this topic, this Article discusses the three current proposals in legal scholarship addressing the use of social media in CFES. At one end, law student Amy-Kate Roeder argues the Florida CFE policy is unconstitutional, because it allows the bar access to information that it could not legally request, such as religious status and sexual orientation.<sup>39</sup> She argues that all jurisdictions should only consider publicly available social media information—that is information that is shown following a search for the user's name, but not any information protected by privacy settings.<sup>40</sup> Roeder's proposed policy would allow applicants to control information available in CFES by making decisions on their level of social media privacy in light of the bar's published policy.

In the middle, law student Dina Epstein argues that online information should only be utilized when vetted by an impartial third source, such as an applicant's law school.<sup>41</sup> Epstein fears that allowing the bar to act as "prosecutor, judge, and jury" leaves too

---

<sup>38</sup> *In re Stolar*, 401 U.S. at 28, 33.

<sup>39</sup> Amy-Kate Roeder, *Wall Posts, Status Updates, and the Bar: How Social Networking Impacts Character and Fitness Requirements*, 35 J. LEGAL PROF. 145 (2010).

<sup>40</sup> *Id.* at 154-55.

<sup>41</sup> Dina Epstein, Note, *Have I Been Googled?: Character and Fitness in the Age of Google, Facebook and YouTube*, 21 GEO. J. LEGAL ETHICS 715 (2008). This article was published prior to Florida's announcement of its social media policy.

much room for abuse, which is especially problematic as it is so hard to distinguish “online fact from online fiction.”<sup>42</sup> She also believes that clear rules regarding the evaluation of information from an applicant’s social media use may ensure that applicants feel free to engage in online legal discussions without fear of being negatively impacted on their CFEs.<sup>43</sup>

At the other end, Michelle Morris, a lecturer at the University of Virginia Law School, argues that all online conduct by an applicant should be available to the bar, including anonymous postings.<sup>44</sup> Morris contends that her policy will force applicants to “take credit (or blame) for their own words.”<sup>45</sup> Her arguments were written primarily in response to online behavior that was racist, sexist, and harmful to others, such as the website Autoadmit.com, on which Yale law students have posted anonymous offensive and humiliating comments about classmates.<sup>46</sup> Morris’ position targets behaviors at the extremes, which are unlikely to be exhibited by most candidates. However, her proposal sweeps significantly more broadly than the behaviors Morris sought to target and the bar association’s access to all online conduct of applicants may create problems of its own.

In sum, Epstein, Roeder and Morris’ differing positions demonstrate the breadth of debate regarding use of social media accounts in CFE. Data gathered from applicants’ accounts may be both under-inclusive and over-inclusive. Additionally, bar organizations may be improperly and unconstitutionally utilizing information that cannot legally be obtained through other means.

---

<sup>42</sup> *Id.* at 727.

<sup>43</sup> *Id.*

<sup>44</sup> Michelle Morris, *The Legal Profession, Personal Responsibility, and the Internet*, 117 YALE L.J. POCKET PART 53 (2007).

<sup>45</sup> *Id.*

<sup>46</sup> Jonathan Sabin, *Every Click You Make: How the Proposed Disclosure of Law Students’ Online Identities Violates Their First Amendment Right to Free Association*, 17 J.L. & POL’Y 699, 700 (2009) (noting that Morris was particularly concerned with online behavior that was racist, sexist, and harmful to others, such as the website Autoadmit.com, on which Yale law students have posted anonymous offensive and humiliating comments about classmates).

*B. A Proposal for Clarity in CFE Standards and Constitutional Social Media Policies*

In light of the above commentators' proposals for a social media policy in CFEs, this article proposes that jurisdictions should adopt and publish clear social media policies for CFEs that ensure applicants' constitutional rights will be respected, while still holding applicants responsible for information available publically on their social media accounts. First and foremost, bars can adhere most closely to the constitutional requirements by publishing the standards by which applicants will be evaluated and the types of traits an applicant must demonstrate to succeed on a CFE. This approach may allow state supreme courts to review and approve standards before they are formally adopted. Additionally, bars should list the types of conduct that may warrant further inquiry and eventually lead to an unsuccessful CFE. Further, bars should state, at least generally, how the conduct of concern will be evaluated. Finally, bars should explicitly note what types of information gathered on applicants' social media accounts may not be considered by the bar.

Regardless of how much information the bar can access, there are certain types of information that should not be considered by the bar out of respect for applicants' First and Fourteenth Amendment rights. First, information regarding an applicant's gender, sexual orientation, ethnic background and physical disabilities should never be considered by the bar in order to protect each applicant's Fourteenth Amendment right to freedom from discrimination. Second, the bar should be allowed to consider evidence of applicants' extremist political or religious beliefs and associations that are suggested by social media conduct only when corroborated by evidence from another source, such as a personal interview. This method would be narrowly tailored to achieve the state's compelling interest of barring admission to an applicant who specifically seeks to overthrow the U.S. government through violent means or has a specific intent or has taken specific action to incite racial hatred or "to carry out his life's mission of depriving

those he dislikes of their legal rights.”<sup>47</sup> Because comments on social media sites may not have been written seriously or may have been written by a third party, not the account owner, such comments should not be sufficient evidence, standing alone, of an applicant’s intentions to violently overthrow the U.S. government. This recommendation may require that one employee of the bar association screen an applicant’s social media account(s) and pass on the CFE committee relevant evidence to assess a candidate; however, this screening person would withhold any evidence gathered suggesting an applicant holds extremist political or religious beliefs unless the CFE committee finds evidence of this from a separate source.

Third, if the bar discovers that more investigation of an applicant’s social media account is necessary, then that party should be notified of the committee’s intent to proceed. This would protect the applicant’s due process rights by ensuring the applicant time to review any relevant social media accounts in preparation for a hearing with the CFE board.

## V. CONCLUSION

As social media becomes increasingly popular among law students, bar policies governing this type of activity will directly impact how future lawyers use social media in order to protect their professional futures. Florida’s policy of considering social media accounts is the first of its kind and may offer guidance to other bar organizations in drafting their own rules. Past Supreme Court cases also provide some guidance on policies that will be constitutional and those that will not. Applicants’ constitutional rights will best be protected by social media policies that specify what the bar may not consider regardless of whether public or private access is granted to the accounts. Bars should not consider information that would infringe upon an applicant’s constitutional rights.

---

<sup>47</sup> *In re Hale*, in GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER CRAMTON, GEORGE M. COHEN, & W. BRADLEY WENDEL. *THE LAW AND ETHICS OF LAWYERING* 1052 (5th ed. 2010).



#### PRACTICE POINTERS

- Practitioners, law school faculty, and other members of the legal community should encourage their jurisdiction's bar organization to adopt and publish CFE standards.
- Bar organizations should consider whether online information gathered from both personal and limited-access websites should be utilized in applicant CFEs. The bar association should invite the local legal community to join in this discussion.
- Bar organizations that choose to consider information gathered about applicants from their social media accounts should specify what types of information may and may not be utilized.